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Constitutional Law - Freedom of the Press - Newsmen's Privilege - Requiring Newsmen to Testify before State or Federal Grand Juries Held Not Violative of First Amendment

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The PARC order has manifold ramifications for the state school system. The most important effect, obviously, is the new opportunity created for retarded children. The extent of this opportunity may be limited, however, by the increased strain upon the finances and facilities of the state school system. The Majority Leader of the Pennsylvania House, K. Leroy Irvis, has estimated the cost of educating retarded children in Pennsylvania to be $131 million per year.[81] Special educational classes will doubtless require many new facilities and teachers. In order to provide the needed revenue, a bill, pending in the United States Congress, would direct the federal government to pay 75 per cent of the costs involved in educating retarded children.[82]

In summary, the court has remained well within the established legal structure in approving the consent agreement. Despite the administrative and financial problems, the long-range effects of the court's decision appear to be positive. To deny children an education because of a personal handicap is to deny them an opportunity to attain a certain degree of self-sufficiency in society. While the administrative problems posed by *PARC* may not be resolved for years, the decision is a step toward equal educational opportunity being afforded to retarded children in Pennsylvania.

Alfred J. D'Angelo, Jr.

CONSTITUTIONAL LAW — FREEDOM OF THE PRESS — NEWSMEN'S PRIVILEGE — REQUIRING NEWSMEN TO TESTIFY BEFORE STATE OR FEDERAL GRAND JURIES HELD NOT VIOLATIVE OF FIRST AMENDMENT.

Branzburg v. Hayes (U.S. 1972)

Petitioner Branzburg and respondent Caldwell, both newspaper reporters,[1] were subpoenaed to testify before different grand juries because their respective newspaper articles concerned matters under grand jury investigation.[2] Both newsmen refused to testify, contending that the first

81. *Id.*
82. *Id.*

1. Petitioner Branzburg worked as a staff reporter for the Courier-Journal, a daily newspaper published in Louisville, Kentucky. Branzburg v. Hayes, 408 U.S. 665, 667 (1972). Respondent Caldwell was a reporter for the New York Times. *Id.* at 675.

2. Petitioner Branzburg was subpoenaed to testify about his article concerning illegal dealings in narcotics, *id.* at 668, while respondent Caldwell was subpoenaed before a federal grand jury investigating possible violations of a number of criminal statutes by the Black Panther Party to recount his publications concerning the activities of that party. *Id.* at 675.

amendment prevented a grand jury from compelling them to reveal their confidant's identity and any information received in confidence.[3]

A state trial court rejected petitioner Branzburg's first amendment claim for privilege[4] and ordered him to answer all pertinent questions. The Kentucky Court of Appeals affirmed the lower court order,[5] and petitioner pressed his present appeal.

The United States District Court for the Northern District of California denied respondent Caldwell's motion to quash the subpoena demanding his appearance, but issued a protective order[6] granting him a qualified privilege to refuse disclosure of confidential information until the Government demonstrated an overriding interest in requiring his testimony.[7] Caldwell, however, refused to appear and was held in contempt by the trial court. The Ninth Circuit Court of Appeals reversed the contempt order, holding that Caldwell need not even appear before the grand jury until the Government could demonstrate an overriding interest demanding his appearance.[8]

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3. The newsmen's argument was basically that, to gather news, it is often necessary for a reporter to assert to his source that his anonymity will be preserved and that only selected portions of the conversation will be published. Both Branzburg and Caldwell urged that compulsory testimony would destroy these confidences and thus curtail the vital flow of news to the public. *See id.* at 678–79.

4. Petitioner Branzburg also argued for a privilege on the ground that his refusal to answer was authorized by KY. REV. STAT. § 421.100 (1971), which provides:

> No person shall be compelled to disclose in any legal proceeding or trial before any court or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.

Branzburg v. Pound, 461 S.W.2d 345, 346 (Ky. 1970).

5. Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970), *aff'd*, 408 U.S. 665 (1972). Petitioner Branzburg sought writs of prohibition and mandamus in the Kentucky Court of Appeals barring enforcement of the lower court contempt order. The court of appeals denied the writs, holding that Branzburg had abandoned his first amendment argument in a supplemental memorandum. *Id.* at 346 n.1. The court summarily dismissed Branzburg's argument that the Kentucky Constitution provided a newsmen's privilege. The court did, however, construe section 421.100 (*see* note 4 *supra*) as granting a reporter the privilege of refusing to divulge the identity of an informant who supplied him with information, but held that this statute did not grant a newsman immunity from testifying about events he had observed personally, including the identities of those persons he had observed. *Id.* at 347.

Sometime later, petitioner Branzburg wrote another story concerning drugs for which he was again subpoenaed to appear before the grand jury. He moved to quash that summons on identical first amendment grounds, and the Kentucky Court of Appeals again affirmed the denial of his motion. Moreover, the court reaffirmed its construction of section 421.100 and rejected his first amendment argument based on its conviction that a newsman's testimony would not impair his effectiveness as a reporter to a degree that would constitute a violation of the freedom of the press guaranteed in the first amendment. This second case, Branzburg v. Meigs, was unreported, but selected portions are reproduced in Branzburg v. Hayes, 408 U.S. 665, 669, 671 (1972).

6. The order provided that Caldwell did not have to reveal confidential information or sources which he had received as a journalist assembling news and passing it on to the public through the various news media. *In re* Caldwell, 311 F. Supp. 358, 362 (N.D. Cal. 1970).

7. *Id.*

8. Caldwell v. United States, 434 F.2d 1081, 1088 (9th Cir. 1970), *rev'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972).

The Supreme Court affirmed the decision of the Kentucky Court of Appeals and reversed the Ninth Circuit, *holding* that the first amendment does not accord a newspaper reporter a constitutional testimonial privilege to conceal information relevant to a grand jury's investigation of a crime.[9] *Branzburg v. Hayes,* 408 U.S. 665 (1972).

The common law accorded a newsman no privilege to conceal his sources before a grand jury, trial court, or legislative committee,[10] primarily because the public's right to hear every man's evidence was deemed paramount to the newsman's desire to protect the confidential relationship with his source.[11] As early as 1896, however, state legislatures recognized the need for a statutory privilege, and, to date, seventeen states have enacted statutes[12] granting news reporters various degrees of protection.[13] While

9. The *Branzburg* decision also reviewed *In re* Pappas, ... Mass. ....., 266 N.E.2d 297 (1971). Pappas, a Providence, Rhode Island newsman, was covering the activities of the Black Panther Party in Massachusetts and was summoned before a grand jury in that state. He appeared, claiming a first amendment privilege identical to that sought by petitioner Branzburg and respondent Caldwell. *Id.* at ....., 266 N.E.2d at 298. The Supreme Court affirmed the decision of the Supreme Judicial Court of Massachusetts which had rejected Pappas' claim for privilege on virtually the same grounds employed by the Kentucky Court of Appeals. Branzburg v. Hayes, 408 U.S. 665, 674–75 (1972). Both state courts indicated that the insignificant constriction which compulsory testimony worked on the free flow of news did not warrant a reporter's testimonial privilege. Branzburg v. Meigs, *cited in id.* at 670–71.

10. *See generally* 8 J. WIGMORE, EVIDENCE § 2192 (McNaughten ed. 1961); Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources,* 64 NW. U.L. REV. 18, 20 (1969); Annot., 7 A.L.R.3d 591 (1966).

11. "For more than three centuries it has been recognized as a fundamental maxim that the public . . . has a right to everyman's evidence." 8 J. WIGMORE, EVIDENCE § 2192, at 70 (McNaughten ed. 1961). Dean Wigmore reasoned that the proper administration of the judicial process commands all citizens to divulge whatever pertinent knowledge they may have with respect to any judicial investigation. *Id.* at 73.

12. ALA. CODE tit. 7, § 370 (1958); ALASKA STAT. § 09.25.150 (Cum. Supp. 1970); ARIZ. REV. STAT. ANN. § 12-2237 (1956); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE § 1070 (West 1966); IND. ANN. STAT. § 2-1733 (1968); KY. REV. STAT. § 421.100 (1971); LA. REV. STAT. §§ 45:1451-54 (Supp. 1972); MD. ANN. CODE art. 35, § 2 (Supp. 1971); MICH. COMP. LAWS ANN. § 767.5a (1968); MONT. REV. CODES ANN. § 601-2 (1947); NEV. REV. STAT. § 48.087 (1971); N.J. STAT. ANN. §§ 2A:84A-21 (Supp. 1972); N.M. STAT. ANN. § 20-1-12.1 (Supp. 1971); N.Y. CIV. RIGHTS LAW § 79-H (McKinney Supp. 1971); OHIO REV. CODE ANN. § 2739.12 (Page 1954); PA. STAT. tit. 28, § 330 (Supp. 1972).

13. Thirteen states have statutes couched in terms protecting *sources* before all judicial and legislative bodies without qualification: Alabama, Arizona, California, Indiana, Kentucky, Maryland, Michigan, Montana, Nevada, New Jersey, New York, Ohio, and Pennsylvania. One state — Arkansas — expressly qualifies its statutory protection by requiring good faith on the part of the newsman. Three states — Alaska, Louisiana, and New Mexico — have statutes which provide that the protection is vitiated if a court rules that disclosure is essential to the public interest. Six states — Alabama, Arizona, California, Kentucky, Maryland, and New Jersey — have statutes which protect only the sources of *published* information. The remaining states have statutes which shield sources regardless of whether their information was published or not. Only three states — Michigan, New York, and Pennsylvania — provide the newsman with immunity from testifying about the information received as well as the identity of the source. *See* note 12 *supra.*

Reported cases construing these statutes are relatively scarce, and with the exception of *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963), and Beechcroft v. Point Pleasant Publishing Co., 82 N.J. Super. 269, 197 A.2d 416 (1964), the newsmen's privilege statutes have been narrowly construed. *See, e.g.,* Farr v. Superior Court, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (Ct. App. 1972); *In re* Howard, 136 Cal. App. 2d 816, 289 P.2d 537 (Ct. App. 1955); Lipps v. State, 258 N.E.2d 622 (Ind. 1970); State v. Donovan, 129 N.J.L. 478, 30 A.2d 421 (N.J. 1943).

similar federal legislation has also been introduced,[14] no bill has been reported out of committee.[15]

The newsmen's original claim to a testimonial privilege was premised on their conviction that coerced identification of confidential sources would not only impugn the reporter's professional reputation,[16] but also destroy those confidential sources essential to effective newspaper reporting.[17] Such arguments have uniformly been rejected by jurisdictions without newsmen's privilege statutes,[18] and the newsman has been forced to reveal his source or face contempt.

It was not until 1958 that the argument for a constitutional newsmen's privilege was first propounded. In *Garland v. Torre,*[19] the Second Circuit acknowledged that compelled disclosure of a journalist's confidential sources could constitute an abridgment of the freedom of the press guaranteed by the first amendment by limiting the newsman's access to news sources. Nevertheless, the *Garland* court concluded that the first amendment newsmen's privilege was not absolute and yielded to the more pronounced public policy that all witnesses shall testify.[20] Accordingly, the Second Circuit held that since the identity of the newswoman's source went to the heart of the plaintiff's claim, it must be revealed.[21] The Supreme Court denied certiorari,[22] thereby refusing to examine the constitutional argument for a newsmen's privilege at that time.

In the wake of *Garland,* the judiciary has repeatedly demonstrated a lack of consistency when grappling with the purported constitutional basis for a newsmen's privilege. Cases rejecting the privilege have done so for

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14. *See, e.g.,* S. 1311, 91st Cong., 2d Sess. (1970); S. 3552, 91st Cong., 2d Sess. (1970); H.R. 16328, 91st Cong., 2d Sess. (1970); H.R. 16704, 91st Cong., 2d Sess. (1970).

15. *See* Branzburg v. Hayes, 408 U.S. 665, 689 & n.28 (1972); Guest & Stanzler, *supra* note 10, at 21.

16. *See, e.g.,* Plunkett v. Hamilton, 136 Ga. 72, 81, 70 S.E. 781, 785 (1911).

17. *See* Guest & Stanzler, *supra* note 10, at 20.

18. *See, e.g.,* Adams v. Associated Press, 46 F.R.D. 439 (S.D. Tex. 1969), *cert. dismissed per stipulation,* 402 U.S. 901 (1971); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957); Joslyn v. People, 67 Colo. 297, 184 P. 375 (1919); Clein v. State, 52 So. 2d 117 (Fla. 1950); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911).

Even those states which later enacted newsmen's privilege statutes had not granted a reporter privilege on common law grounds. *See, e.g., Ex parte* Lawrence, 116 Cal. 298, 48 P. 124 (1897); *In re* Grunow, 84 N.J.L. 235, 85 A. 1011 (N.J. 1913); People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936).

19. 259 F.2d 545 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958). Judy Garland, in a suit for defamation and breach of contract against CBS, sought the name of a CBS "network executive" whose allegedly defamatory statements had been published in Miss Torre's "gossip" column in the New York Herald-Tribune. Miss Torre was convicted of contempt of court when she ignored a district court order and refused to divulge the identity of her informant. On appeal of this contempt citation, Miss Torre urged, *inter alia,* that forced disclosure would derogate her first amendment rights. The Second Circuit rejected the newsmen's privilege argument and held for Miss Garland. *Id.* at 550.

20. *Id.*

21. *Id.*

22. 358 U.S. 910 (1958).

varying reasons: (1) the identity of the source went to the heart of the plaintiff's claim;[23] (2) other interests outweighed the newsmen's first amendment rights;[24] and (3) the granting of a testimonial privilege to the press would violate the equal protection clause.[25] One court even declined to articulate any rationale and instead merely summarily rejected the constitutional argument.[26] While a limited number of courts have recently recognized the constitutional newsmen's privilege in one form or another,[27] the instant case marks the first time the Supreme Court has examined the question of whether the first amendment guarantees of freedom of the press and freedom of speech are abridged by compelling newsmen to testify before state and federal grand juries under threat of contempt. In reaching the conclusion that such compulsory testimony did not violate the first amendment, the Court followed the precedent set forth by state[28] and lower federal[29] courts, which have consistently applied a presumption[30] against testimonial privileges, and have concluded that any

23. Garland v. Torre, 259 F.2d 545, 550 (2d Cir. 1958).

24. *In re* Goodfader, 45 Hawaii 317, 329, 367 P.2d 472, 478 (1961).

25. In State v. Buchanan, 250 Ore. 244, 436 P.2d 729, *cert. denied,* 392 U.S. 905 (1968), the Supreme Court of Oregon noted that members of the press should have no greater rights to gather news than any other citizen, and consequently rejected a student newspaper reporter's claim for privilege, stressing the possible equal protection implications. *Id.* at 248–49, 436 P.2d at 731. In so holding, the court noted that freedom of the press is not a private haven for the news media but a right which belongs with the public. *Id.*

26. *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963). While the *Taylor* court held that the state newsmen's privilege statute protected newspapers against forced disclosure before investigating grand juries, it rejected the constitutional claim to a privilege as "devoid of merit." *Id.* at 40, 193 A.2d at 184.

27. *See* Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *rev'd,* 408 U.S. 665 (1972) ("compelling need" test); *In re* Grand Jury Witnesses, 322 F. Supp. 573 (N.D. Cal. 1970) ("compelling need" test); People v. Dohrn, Crim. No. 69-3808 (Cir. Ct. Cook Cty., Ill., May 20, 1970) ("miscarriage of justice" test). Even these cases which recognized a newsmen's privilege utilized different tests in determining whether the privilege applied.

28. *See, e.g., Ex parte* Lawrence, 116 Cal. 298, 48 P. 124 (1897); Joslyn v. People, 67 Colo. 297, 184 P. 375 (1919); Clein v. State, 52 So. 2d 117 (Fla. 1950); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911); *In re* Grunow, 84 N.J.L. 235, 85 A. 1011 (N.J. 1913); People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936).

29. *See, e.g.,* Adams v. Associated Press, 46 F.R.D. 439 (S.D. Tex. 1969), *cert. dismissed per stipulation,* 402 U.S. 901 (1971); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957).

30. *See* 8 J. WIGMORE, EVIDENCE § 2192, at 70 (McNaughten ed. 1961). Dean Wigmore stated that upon examining any claim for testimonial privilege, the court should presume that there is a general duty to give whatever testimony a witness is capable of giving, and any exemption is "distinctly exceptional." *Id.* The Supreme Court has enunciated this presumption and reasoned that every testimonial privilege must be based on a "substantial individual interest which has been found . . . to outweigh the public interest in the search for truth." United States v. Bryan, 339 U.S. 323, 331 (1950).

The commentators have suggested that the courts analyze constitutional testimonial privileges in a "cart before the horse" fashion. *See* Guest & Stanzler, *supra* note 10, at 39–40. It is submitted that conduct which restrains the flow of news should be presumed unconstitutional unless strongly justified. Thus, a proper analysis should begin with the presumption of a constitutional newsmen's privilege and then attempt to justify its denial because of the public interest in compulsory testimony. *Id.* A good example of a situation wherein the constitutional testimonial privilege is presumed paramount to a common law interest is the right of a witness not to testify on

first amendment interest is outweighed by the general obligation of every citizen to testify before grand juries.[31]

The *Branzburg* Court attempted to balance two competing interests — the value of unfettered dissemination of news and the need for more effective law enforcement. At the heart of the *Branzburg* opinion is the Court's determination that the value of protecting the integrity of the grand jury[32] system outweighs any potential infringement of first amendment freedoms which result from forcing newsmen to testify concerning matters revealed to them in confidence. The majority intimated that the grand jury, in order to best fulfill its role,[33] needs wide-open investigative authority which in turn mandates extensive subpoena power to question desired witnesses.[34]

In *Watkins v. United States,*[35] the Court faced a problem similar to that presented by the instant case in examining the rights of witnesses called to testify before a congressional committee investigation. The legislative investigative committees perform a somewhat analogous role to that of the grand jury,[36] and the Court in *Watkins* provided the witnesses

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the grounds that his fifth amendment right against self-incrimination would be violated. *Id.* at 28.

It is interesting to note that the *Branzburg* majority phrased the issue before it as "the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime." 408 U.S. at 682. Mr. Justice Douglas, dissenting in United States v. Caldwell, stated the issue as "the extent to which the first amendment . . . must yield to the government's asserted need to know a reporter's unprinted information." *Id.* at 713 (dissenting opinion).

31. 408 U.S. at 686.

32. Although the *Branzburg* Court assumed that the grand jury performs an invaluable function in our criminal justice system, the institution has been the subject of much controversy in recent years, and many commentators question its continued usefulness. *See, e.g.,* Antell, *The Modern Grand Jury: Benighted Supergovernment,* 51 A.B.A.J. 153, 155–56 (1965); Whyte, *Is the Grand Jury Necessary?,* 45 VA. L. REV. 461, 487–91 (1959); 104 U. PA. L. REV. 429, 432–33 (1955). Mr. Justice White's opinion, which stressed the importance of the grand jury, could be viewed as an attempt by the Court to instill more faith in the 800-year-old institution.

33. The grand jury serves a dual function — to determine if there is probable cause to believe a crime has been committed and to protect citizens from unwarranted criminal prosecution. *See* Hurtado v. California, 110 U.S. 516, 556 (1884).

34. 408 U.S. at 688. The *Branzburg* majority saw two adverse effects on the grand jury in granting a newsmen's privilege: (1) the concealing of information about criminal activity by the reporter would render the grand jury's investigation less thorough; and (2) the determination of preliminary questions in deciding whether the reporter would be forced to testify would clog the grand jury process. *Id.* at 692, 705.

In dissent, Mr. Justice Stewart reasoned that a *qualified* privilege would not upset the function of the grand jury significantly, but would preserve the reporter's first amendment rights. *See* notes 50–54 *infra.*

35. 354 U.S. 178 (1957). In *Watkins,* a union leader appeared before the House Un-American Activities Committee to testify concerning the alleged communist affiliations of some of his associates. The defendant refused to testify and was convicted for violation of a federal statute which required witnesses before a legislative committee to answer all questions pertinent to the committee's inquiry. *Id.* at 185. The Supreme Court reversed the conviction, concluding that the petitioner must be able to determine which questions were pertinent, and that no witness could be convicted for refusing to answer questions beyond the proper scope of inquiry. *Id.* at 215.

36. For cases demonstrating the importance of legislative investigations, *see, e.g.,* Barenblatt v. United States, 360 U.S. 109, 111–12 (1959); United States v. Rumely, 345 U.S. 41, 43 (1953).

called to testify with first amendment safeguards.[37] There, the Court reversed a lower court conviction of a defendant for violating a federal statute which compelled witnesses to answer any question pertinent to a legislative inquiry, stating that the first amendment guarantees must not be infringed by such a legislative investigation.[38] The *Watkins* Court refused to limit unnecessarily the first amendment protections because it felt that such an action would ignore the judiciary's responsibility to prevent unwarranted arbridgement of individual first amendment rights,[39] and consequently the Court concluded that the investigative power of legislative committees should be wielded carefully.[40] Therefore, legislative committee questioning must now seek information "*clearly* relevant to a *precisely* defined subject of governmental inquiry" in which the Government has a compelling and overriding interest.[41]

The *Branzburg* majority, however, did not seriously consider the legislative investigation analogy, but instead stressed, among other things, the more fundamental role of the grand jury investigation.[42] After noting that the grand juries in the instant case were not " 'probing at will without relation to existing need,' "[43] the Court concluded that the grand jury's function in promoting effective law enforcement per se provided an interest overriding any possible first amendment ramifications of compelled testimony.[44]

By categorically denying the reporter's testimonial privilege in all grand jury investigations,[45] the Court ignored its own acknowledgment of judicial responsibility as delineated in *Watkins*.[46] Although the roles of the legislative committee and the grand jury are certainly distinguishable, nevertheless it remains unclear why first amendment protections are appli-

37. 354 U.S. at 198–99.
38. *Id.* at 188.
39. *Id.* at 198–99.
40. *Id.* at 198–201.
41. *Cf.* 408 U.S. at 744 (Stewart, J., dissenting) (emphasis supplied by the Court).
42. *Id.* at 700.
43. *Id., quoting* Degregory v. Attorney Gen., 383 U.S. 825, 829 (1966).
44. 408 U.S. at 700. The majority did indicate that, if the grand jury investigation were being conducted in bad faith, then a first amendment privilege would be available to the reporter. *Id.* at 707.
45. While the *Branzburg* majority made it clear that a newsman's claim for privilege would be denied in the absence of a bad faith grand jury investigation, Mr. Justice Powell, concurring with the Court's opinion, took a less stern approach to the problem of balancing the interest in freedom of the press with the obligation of the citizenry to give testimony relevant to an investigation of criminal conduct. Justice Powell indicated that courts will protect the newsman not only if the investigation is being conducted in bad faith, but also if the reporter has a bona fide first amendment interest in that his testimony "implicates confidential source relationships without a legitimate need of law enforcement." *Id.* at 710 (concurring opinion). He further suggested that the test for granting the privilege should be applied on a case-by-case basis by balancing "these vital constitutional and societal interests . . . ." *Id.*

It is puzzling that Mr. Justice Powell should join in the rather strict opinion of the majority while using language very similar to that of Mr. Justice Stewart in his argument for a qualified privilege. *See* notes 50–54 and accompanying text *infra*. The effect, if any, of Justice Powell's language is as yet uncertain, but it could be used to soften the majority's almost absolute denial of the newsmen's privilege. Even the dissent noted that the concurring opinion "gives some hope of a more flexible view in the future." *Id.* at 725 (Stewart, J., dissenting).
46. *See* text accompanying note 39 *supra*.

cable to witnesses appearing before a congressional committee but not to those testifying before a grand jury.

Recent commentary[47] and court decisions[48] have suggested that a qualified privilege[49] would best balance the interest in effective law enforcement with the conflicting interest in protecting the free flow of news to the public. The specifics of the qualified privilege were delineated by Mr. Justice Stewart who stated that before a news reporter could be compelled to testify before a grand jury proceeding, the government must:

> 1) show there is probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of law; 2) demonstrate that the information sought cannot be obtained by alternative means less destructive of first amendment rights; and 3) demonstrate a compelling and overriding interest in the information.[50]

47. *See, e.g.*, Guest & Stanzler, *supra* note 10, at 50; Comment, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1198, 1223 (1970); Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838, 861 (1971); Note, *Reporters and Their Sources; The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317, 338 (1970) [hereinafter cited as *Reporters and Their Sources*].

48. *See, e.g., In re* Grand Jury Witnesses, 322 F. Supp. 573 (N.D. Cal. 1970); People v. Dohrn, Crim. No. 69-3808 (Cir. Ct. Cook Cty., Ill., May 20, 1970).

49. While most commentary and judicial discussion consider a qualified privilege, Mr. Justice Douglas, dissenting, maintained that only an absolute privilege would protect the first amendment rights of the newsman. 408 U.S. at 712. According to Justice Douglas, the only qualification on the reporter's privilege would arise when the reporter himself was involved in a crime. *Id.* His opinion is quite consistent with his view that the first amendment is written in absolute terms and thus should be interpreted in an absolute fashion. Any test, such as the "compelling need" test or the "clear and present danger" test, which applies less than blanket protection, will eventually become relaxed until ultimately no protection is provided at all. Stating that "[a] reporter is no better than his source of information," Justice Douglas submitted that if the *Branzburg* decision becomes settled law, the reporter will function as merely a messenger of governmental press releases. *Id.* at 722.

50. *Id.* at 743 (Stewart, J., dissenting). There are three main concepts embodied in the qualified privilege: (1) the probable cause requirement; (2) the alternative means concept; and (3) the compelling interest test.

The probable cause requirement is designed to prevent the government from taking a "fishing expedition" at the expense of the press. The loose standards of materiality and relevance in grand jury proceedings could, absent this provision, force reporters to reveal information about sources who have neither committed crimes nor have knowledge of criminal activity. *Id.* at 744 n.34. *See* United States v. Costello, 350 U.S. 359, 363 (1956); Holt v. United States, 218 U.S. 245, 248 (1910).

The alternative means provision of the qualified privilege ensures that when the government can serve society's interest in effective law enforcement by methods that will have no effect on the flow of news to the public, then it should be forced to pursue those methods. Former Attorney General John Mitchell recognized that requiring newsmen to testify may sometimes inhibit first amendment rights and requested that a reasonable attempt be made to obtain information from non-press sources prior to the issuance of a subpoena to any member of the press. U.S. DEP'T OF JUSTICE, MEMO No. 692 (Sept. 2, 1970), *cited in* Branzburg v. Hayes, 408 U.S. 707 n.41 (1972).

The compelling interest clause stems from those cases recognizing that governmental action which has a destructive effect on first amendment rights must be justified by a "compelling" or "paramount" interest. For example, in Degregory v. Attorney Gen., 383 U.S. 825 (1966), the Supreme Court reversed the contempt conviction of a witness who refused to answer questions concerning his affiliation with communist organizations. Noting the legislative committee's bona fide role in lawmaking, the Court held that the witness' refusal to answer was proper in that "[t]here [was] no showing of 'overriding and compelling state interest' that would warrant intrusion into the realm of . . . the first amendment." *Id.* at 829, *citing* Gibson v. Florida

The qualified privilege attempts to prevent the government from utilizing the reporter as a general investigative tool,[51] but at the same time holds the newsman accountable to the public.

The majority rejected the qualified privilege, reasoning that the creation of a qualified privilege would deter confidential sources from giving information since they would probably fear that the reporter in whom they confided would be forced to testify concerning his source of information.[52] Hence, the suggested qualified privilege would not adequately protect the free flow of news which underlies the newsmen's first amendment argument.[53] It is submitted, however, that the Court's reasoning is faulty because confidential sources are presently willing to supply newsmen with information in the absence of any privilege,[54] and it is therefore unlikely that the judicial recognition of a newsmen's privilege, however qualified, would deter sources from continuing to divulge information. Conceding that the qualified privilege is not the perfect answer, the denial of the privilege is an even weaker solution for it will have little effect in bringing about more effective law enforcement, because either (1) informants will fear disclosure and consequently refuse to divulge information, (2) reporters will cease to print information received in confidence, or (3) newsmen will choose to go to jail rather than disclose their confidential sources.[55]

Newsmen are frequently summoned to testify before bodies other than grand juries, *viz.*, legislative committees and civil or criminal trials. The language of the *Branzburg* opinion emphasized the nature and importance of the grand jury, and its need for wide, untrammeled investigations. Consequently, it seems clear that the Court intended to close the door to a constitutional newsmen's privilege only with respect to grand jury proceedings.[56] Future arguments for a qualified or absolute newsmen's privilege in non-grand jury settings will be analogous to those presented in *Branzburg,* but the majority's reliance upon the function and value of

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Legislative Comm., 372 U.S. 539, 546 (1963). For other "compelling interest" cases, *see* NAACP v. Button, 371 U.S. 415, 439 (1963); Bates v. Little Rock, 361 U.S. 516, 524 (1960); NAACP v. Alabama, 357 U.S. 449, 464 (1958); Thomas v. Collins, 323 U.S. 516, 530 (1945).

51. *See* 408 U.S. at 742–43 (Stewart, J., dissenting).

52. *Id.* at 702 n.39.

53. The *Branzburg* majority did not, however, consider the deterrent effect on informers or any resulting constriction on the flow of news as being critical to the issue before it:

> Accepting the fact, however, that an undetermined number of informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to newsmen if they fear identification by a reporter in an official investigation, we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.

Id. at 695.

54. *See* Guest & Stanzler, *supra* note 10, at 47. It has been observed that the willingness of reporters to go to jail rather than divulge their sources is recognized by informants and such willingness is a major reason why these sources continue to give information to newsmen in jurisdictions without protective statutes. *Id.*

55. *Id.* at 44–47.

56. *See Reporters and Their Sources, supra* note 47, at 345.

the grand jury may lead future courts to distinguish *Branzburg* and limit its application solely to grand jury proceedings. For example, newsmen appearing before legislative committees could argue that the *Branzburg* majority distinguished the legislative committee as performing a less vital role than the grand jury,[57] and reporters called as witnesses in civil or criminal trials could argue the continued vitality of *Garland* which was left undisturbed by *Branzburg*.[58] A qualified privilege may very well emerge in these non-grand jury settings.[59]

The *Branzburg* Court viewed the newsmen's privilege as granting the reporter a special exemption from testifying, so as to preserve his ability to gather news from sources who did not wish to be disclosed.[60] Reporters urge that protection of confidential sources is essential to the news gathering process if the press is to remain more than a printer of prepared press releases.[61] In rejecting the constitutional claim for privilege, the majority relied on prior cases which had held that the first amendment did not guarantee the press a constitutional right to gather news not available to the general public.[62]

In *Zemel v. Rusk*,[63] the Court constitutionally vindicated the refusal of the United States Department of State to validate passports to Cuba, even though such action inhibited the free flow of information concerning that country, by holding that the first amendment did not confer an "unrestrained right to gather news."[64] The majority also drew support from *Sheppard v. Maxwell*,[65] wherein the Court overturned a murder

57. 408 U.S. at 699–701.

58. In *Garland*, the Second Circuit recognized the adverse effect which compulsory testimony placed on the first amendment but, nevertheless, held that when the informant's identity went to the heart of plaintiff's claim, the first amendment implications were outweighed. Garland v. Torre, 259 F.2d 545, 550 (2d Cir. 1958). *See* notes 19–22 and accompanying text *supra*. Since *Branzburg* did not undermine *Garland*, a newsman's argument for privilege would be successful if he could negate the "heart of plaintiff's claim" test.

59. For a discussion of the newsmen's privilege in judicial and quasi-judicial settings, and the varying standards of application, *see Reporters and Their Sources*, *supra* note 47, at 345.

60. 408 U.S. at 682.

61. *Id.* at 729 (Stewart, J., dissenting).

62. New York Times v. United States, 403 U.S. 713, 728–30 (1971) (Stewart, J., concurring); Zemel v. Rusk, 381 U.S. 1, 16–17 (1965); *In re* United Press Ass'ns v. Valente, 308 N.Y. 71, 77, 123 N.E.2d 777, 778 (1954).

63. 381 U.S. 1 (1965). In *Zemel*, the Supreme Court upheld the State Department's refusal to grant the plaintiff a passport to visit Cuba shortly after the United States severed diplomatic relations with that country in 1962. In so holding, the Court repudiated the plaintiff's claim that he had a constitutional right to travel abroad and gather information about foreign countries. *Id.* at 4. The precise issue of the right to gather news arose from plaintiff's request for a passport wherein he stated his purpose for the trip was "[t]o satisfy my curiosity about . . . Cuba and to make me a better informed citizen." *Id.*

64. *Id.* at 17.

65. 384 U.S. 333 (1966). In *Sheppard*, the defendant was convicted in a state court for the murder of his wife. Before and during his trial, petitioner was the subject of extensive media publicity. Throughout the trial, the courtroom was overflowing with members of the press who repeatedly disrupted the proceedings and publicized information prejudicial to the defendant. The trial judge, however, denied the defendant's motions to restrain the newsmen and made no attempt to curtail their activities. The Supreme Court reversed the conviction and concluded that a defendant's right to

conviction in a state court because the trial court had allowed newsmen unfettered access to the courtroom in their efforts to gather news. The *Sheppard* Court concluded that newsmen could be barred from gathering information about a trial if necessary to protect another interest — the defendant's right to a fair trial.[66] In so relying on *Zemel* and *Sheppard,* the *Branzburg* Court ignored precedents which afforded protection to the processes by which news is assembled and disseminated. The right to publish is central to the constitutional guarantees of free press and free speech,[67] and in order to protect to the fullest extent the right to publish, the Court had, on prior occasions, recognized additional rights such as the right to distribute information and the right to receive printed materials. In *Lovell v. Griffin,*[68] the Court voided a statute which required the consent of a city official before any written material could be distributed within the city. In its analysis of the first amendment issue, the Court made it clear that the constitutionality of the statute did not depend on whether it related to the distribution of literature or its publication. Thus, the Court recognized a right to distribute information.[69] Again, in *Lamont v. Postmaster General,*[70] the Court upheld the right of the citizenry to *receive* published information and voided a federal statute which required a written request as a prerequisite to the delivery of nonsealed communist literature from abroad. In so holding, the *Lamont* Court noted that the use of the mails is almost as much a part of free speech "as the right to use our tongues,"[71] and concluded that the statutory requirement had a deterrent effect on first amendment interests.[72]

The dissenting justices in *Branzburg* felt that without these "corollary rights"[73] the right to publish would be unconstitutionally compromised, and opined that the right to gather news should be recognized as no less important to the news dissemination process than the other well-established "corollary rights."[74] Upon a proper examination of *Zemel* and *Sheppard,* one can fairly imply that if there is no "unrestrained" right to gather

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receive a fair trial was paramount to the public interest in gaining information concerning that trial. *Id.* at 363.

66. *Id.* at 359.

67. *See* Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

68. 303 U.S. 444 (1938). In *Lovell,* appellant violated a city ordinance by distributing a religious pamphlet without the required permission. In overturning her conviction, the Supreme Court held the statute void on its face, reasoning that "'[l]iberty of circulating is as essential . . . as liberty of publishing . . . .'" *Id.* at 452, *quoting Ex parte* Jackson, 96 U.S. 727, 733 (1877).

69. 303 U.S. at 452.

70. 381 U.S. 301 (1965). In *Lamont,* the appellant initiated suit to enjoin the postal authorities from refusing to deliver his copy of the Peking Review until he signed the requisite statutory request form. *Id.* at 307.

71. *Id.* at 305. *See* United States *ex rel.* Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 437 (1921).

72. 381 U.S. at 307.

73. In Near v. Minnesota, 283 U.S. 697, 713 (1931), the Court sanctioned yet another corollary right — the right to publish without prior governmental approval.

74. 408 U.S. at 727-28 (Stewart, J., dissenting). For a thorough examination of the right to gather news, *see* Note, *The Right of the Press to Gather Information,* 71 COLUM. L. REV. 838 (1971).

information, there must exist *some* right.[75] While the issue of a right to gather news has never been squarely before the Court,[76] the instant decision may well place that aspect of the news dissemination process beyond first amendment protection.

Although the testimonial privilege is claimed by newsmen, the *Branzburg* Court spent considerable time examining the motives of the newsmen's sources. Informants personally involved in criminal activity seek anonymity to avoid criminal prosecution.[77] With respect to the information derived from these persons, the Court saw the privilege as contrary to effective law enforcement and concluded that the first amendment never over-rides the public's interest in ensuring that neither the source of the news nor its reporter is engaged in a course of criminal activity.[78] Another group of informants which usually wishes to remain anonymous comprises those who have knowledge of the criminal conduct of others, but who have not personally taken part in the criminal activity. In regard to these informants, the Court noted that concealment of their knowledge comes dangerously close to the common law crime of misprision of a felony.[79] It is submitted that the majority was in error when it examined the motives of the informants. The more appropriate view would be that the first amendment supports a newsmen's privilege not to reflect the motives of either the informant or the reporter, but to preserve an atmosphere in which sources from every political and cultural strain are free to provide information, through the media, to the public.[80] On prior occasions, the Supreme Court has emphasized that the first amendment protects literature published anonymously, as well as authored materials, and has indicated

75. *See* 408 U.S. at 728 (Stewart, J., dissenting). From his premise that there is at least some right to gather news, Mr. Justice Stewart builds a logical ladder to the reporter's right to enjoy a confidential relationship with his informant. The Justice urges that one right will lead uncontrovertably to the other if the following three factual statements are accepted:

> 1) newsmen require informants to gather news; 2) confidentiality — the promise or understanding that names or certain aspects of communications will be kept off the record — is essential to the creation and maintenance of a news-gathering relationship with informants; and 3) the existence of an unbridled subpoena power — the absence of a constitutional right protecting, in *any* way, a confidential relationship from compulsory process — will either deter sources from divulging information or deter reporters from gathering and publishing information.

Id. (emphasis supplied by the Court).

76. Several state and lower federal court cases have dealt with the question of a newsman's right to gather news. *See, e.g.,* Providence Journal Co. v. McCoy, 94 F. Supp. 186, 195–96 (D.R.I. 1950) (successful action by newspaper company to enforce the right of its employees to make use of certain public records not available for inspection without permission of city council); Lyles v. State, 330 P.2d 734, 739 (Crim. Ct. App. Okla. 1958) (trial court did not abuse its discretion in permitting television cameras in the courtroom). *But see* Seymour v. United States, 373 F.2d 629, 631–32 (5th Cir. 1967) (local court rule prohibiting the taking of photographs at any judicial proceeding held to be a constitutionally permissible restraint on the press).

77. 408 U.S. at 691.

78. *Id.*

79. *Id.* at 696. Misprision of a felony is the concealing of a felony committed by another without such prior agreement with, or subsequent aid to, the felon as would make the concealing party an accessory before or after the fact. United States v. Perlstein, 126 F.2d 789, 798 (3d Cir. 1942).

80. 408 U.S. at 730 (Stewart, J., dissenting).

that many of the same benefits are derived from both. In *Talley v. California,*[81] the Court voided a municipal ordinance prohibiting the distribution of anonymous handbills as constituting an abridgment of the speech and press freedoms guaranteed by the first amendment.[82] In the process, the *Talley* Court noted that anonymous literature has historically provided the public with a valuable conduit for the free dissemination of information, and that persecuted groups have best been able to criticize oppressive practices in the safety of anonymity.[83] The *Talley* Court concluded that "[i]t is plain that anonymity has sometimes been assumed for the most constructive purposes."[84] Due to the difficulty of a news source to remain anonymous after the *Branzburg* decision, publications resulting from the confidential relationship between reporters and their sources could be seriously inhibited. The *Branzburg* majority did not seem to adhere to the value the Court has previously placed on anonymity in first amendment conduct.

Aside from its denial of a first amendment newsmen's privilege, the *Branzburg* decision did little more than affirm the exceedingly narrow construction by the Kentucky Court of Appeals of a newsmen's privilege statute which on its face purported to grant newsmen a wide scope of protection.[85] In so acting, the Court mentioned nothing of the statute involved, nor of the construction thereof by the Kentucky court, but did state:

> There is . . . merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own area. It goes without saying, of course, that we are powerless to erect any bar to state courts responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.[86]

The Court correctly refused to make a blanket decision encompassing all existing state newsmen's privilege statutes, but regrettably, supplied no standards to guide state legislatures in drafting statutes "within First Amendment limits."[87] The Court also noted that state courts are free to interpret their own constitutions so as to create a constitutional newsmen's privilege, but again provided little in the way of guidelines.[88] By way of

81. 362 U.S. 60 (1960). The petitioner was fined for attempting to distribute the handbills of a national consumers organization which urged readers to boycott listed merchants because of their discriminatory employment practices. *Id.* at 61.

82. *Id.* at 65.

83. *Id.* at 64–65.

84. *Id.* at 65. The *Talley* Court adopted the rationale of two prior Supreme Court cases which had held that states may not force the public identification of members of groups involved with the dispersion of ideas. *See* Bates v. Little Rock, 361 U.S. 516, 523–24 (1960); NAACP v. Alabama, 357 U.S. 449, 462 (1958). Both cases had recognized that the peaceful discussion of matters of public importance would be deterred by identification and subsequent fear of reprisal.

85. KY. REV. STAT. § 421.100 (1971). *See* note 4 *supra.*

86. 408 U.S. at 706.

87. *Id.*

88. *Id.*

conclusion, the Court invited Congress to create a statutory newsmen's privilege if disturbed by the instant decision.[89] Federal legislation proposed prior to the *Branzburg* decision typically permitted nondisclosure of confidential information and sources before *any* conceivable federal investigative body, including the grand jury, by any reporter or "other person directly engaged in the gathering or presenting of news."[90] The proposed privilege was qualified to the extent that it would not apply where the defendant in a civil action required the source for his defense, or where the published information concerned the details of a grand jury or any other proceeding required by law to be secret.[91] The privilege could also be overcome by a showing that the information would be required to prevent a threat to human life, espionage, or foreign aggression.[92]

The *Branzburg* Court wisely recognized its own limitations in interpreting state legislative action and in constitutional construction, and also took care not to encroach upon Congress' power to create a newsmen's privilege. It is clear that newsmen cannot depend upon the United States Constitution as the basis for privilege before a grand jury, but it is as yet unclear whether state legislatures will follow *Branzburg* by refusing to create newsmen's privilege statutes, or whether state courts will adopt the approach of the instant decision by narrowly construing state constitutions and existing newsmen's privilege statutes. It is also difficult to predict whether Congress will continue to seek a newsmen's privilege as in the previous format, or whether a new proposal will emerge in conformity with *Branzburg*.

In concluding that it is better to fight crime than to write about it,[93] the *Branzburg* Court took too simplistic a view of the newsmen's privilege. The interest in protecting the free flow of news, to which the Court has shown an extreme sensitivity,[94] is suddenly subordinated to the role of the grand jury. Perhaps, the Court fears the probable natural extension of granting a reporter's privilege — the establishment of the right to gather news, and the creation of a right to special access to information.[95]

89. Mr. Justice White noted that "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow and broad as deemed necessary . . . ." *Id.*

90. *See, e.g.*, H.R. 16328, 91st Cong., 2d Sess. (1970).

91. *Id.* § 4(b)(2).

92. *Id.* § 4(b)(1).

93. 408 U.S. at 692.

94. *See, e.g.*, New York Times v. United States, 403 U.S. 713 (1971) (Government bears the burden of justifying prior restraints on expression); Time, Inc. v. Hill, 385 U.S. 374 (1967) (rights of privacy subordinate to interest in unfettered flow of news); Memoirs v. Massachusetts, 383 U.S. 413 (1966) (narrowed definition of obscenity); New York Times v. Sullivan, 376 U.S. 254 (1964) (free flow of news paramount to individual injury in libel action); Speiser v. Randall, 357 U.S. 513 (1958) (procedural obstacles erected to protect free expression).

95. Commentators have noted that if a newsmen's privilege is granted in order to protect the reporter's future ability to gather information for the public, the news gatherer may as well gain the power of access to government records and meetings under the guise of his future capacity to obtain for the public information about the activities of public servants. Nelson, *The Newsman's Privilege Against Disclosure of Confidential Sources of Information*, 24 VAND. L. REV. 667, 680 (1971).